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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1980

NO. 80-1873

DOUGLAS E. FRANK and MICHAEL H. FOLB,

Petitioners,

v.

UNITED STATES TRUST COMPANY OF NEW YORK, and LAVENTHOL, KREKSTEIN, HORWATH and HORWATH,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

Respondent United States Trust Company of New York's Brief Opposing Certiorari

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Respondent United States Trust Company of New York's Brief Opposing Certiorari

Respondent United States Trust Company of New York respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion, Laventhol, Krekstein, Horwath &

Horwath v. Horwitch, is reported at 637 F.2d 672.

STATEMENT OF THE CASE

Petioners' statement of the case is essentially correct, but it omits some pertinent facts.

Plaintiffs' amended complaint alleges that the Doug Frank Development Corporation (Frank Corporation), through its president Douglas E. Frank (Frank) and its executive vice president Michael H. Folb (Folb), intended to and did convert the proceeds of an offering of limited partnership interests in Western Properties Limited Partnership (Western Properties) to uses other than those stated in the prospectus, and that at least $2,000,000 have been misappropriated. 637 F.2d at 674. The amended complaint alleges further that the limited partnership

interests were purchased upon the recommendation, investment advice, and through the facilities of the United States Trust Company of New York (U.S. Trust) (Record on appeal (R.) 1566), and that U.S. Trust failed to investigate the Frank Corporation and Western Properties and was negligent in failing to discover the misappropriation, mismanagement, and fraud perpetrated by the Frank Corporation, its officers, and directors (R. 1572).

The amended complaint contains three counts based upon the federal securities laws and two counts based upon state common law (R. 1565-1574; Petition for Writ of Certiorari, page 4). Two of the three federal securities counts contain allegations of wrongdoing against all defendants, including Frank and Folb, while the third alleges wrongdoing against all except Laventhol, Krekstein, Horwath &

Horwath (Laventhol), the accounting firm employed by Western Properties to prepare the registration statement. One common law count is brought against U.S. Trust only, while the other is brought against all defendants.

As the Court of Appeals noted, the nature of the claims against the defendants was such that each defendant would, if found liable, be liable to the plaintiffs for the same payment, that is, "payment for the same harm suffered by the purchasers resulting from the direct action of Frank and Folb, and from the negligence or oversight of the Bank [U.S. Trust] and the accountants [Laventhol] in failing to discover the harmful conduct of Frank and Folb." 637 F.2d at 675.

After issue was joined, the class representative, Jay Herman, entered into a settlement agreement with Frank, Folb,

Western Properties, and the Frank Corporation, wherein, in consideration of Frank and Folb's agreeing to cooperate with plaintiffs in their case and to pay plaintiffs the sum of $8,000, plaintiffs agreed to deliver a release of all claims against Frank, Folb, and Western Properties, and a covenant not to execute on any judgment against the Frank Corporation (R. 2571-2572; Appendix A to Petition for Writ of Certiorari, pages 5-6).[1]

With leave of the district court, U.S. Trust subsequently filed its cross-

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[1] U.S. Trust, as a non-settling defendant without standing to object, did not oppose the settlement on the merits. Laventhol did oppose the settlement on the merits (R. 2683-2688). In response, plaintiffs took the position, supported by authorities, that, as a non-settling defendant, Laventhol did not have standing to object (R. 2700-2701).

claim against the Frank Corporation, Frank, and Folb.[2] The cross-claim alleges that Frank and Folb made representations to U.S. Trust concerning the operations and finances of the Frank Corporation and that to the extent U.S. Trust may be liable to plaintiff, such liability is the result of the representations, acts, omissions, negligence, breach of duty, and other tortious conduct on the part of the Frank Corporation, Frank, and Folb, without similar contributing acts of U.S. Trust (R. 2735-2736). The cross-claim seeks contribution or indemnification from the Frank Corporation, Frank, and Folb.

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[2] At the time of the hearing on the settlement, all parties were aware of U.S. Trust's claims against the cross-claim defendants as U.S. Trust had, by that time, filed its motion for leave to file a cross-claim.

ARGUMENT

Petitioners have demonstrated none of the grounds which constitute the special and important reasons specified in Rule 19 of the Rules of the Supreme Court for the granting of review on certiorari.

I. There is no conflict in the circuits on the question of contribution from settling defendants.

While petitioners may, as they assert in their petition, "believe that the Ninth Circuit has incorrectly decided the issue" (petition, page 10), their assertion that this issue "has not received consistent treatment in the circuits" (petition, pages 9-10) is not correct and they, in fact, fail to cite any circuit opinion on point.

Respondent is aware of only two circuit courts which have considered the

issue: the Second Circuit, in Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27 (2nd Cir. 1976), not discussed or mentioned by petitioners in their argument on this point, and the Ninth Circuit, in the instant case, 637 F.2d 672. The results in the two cases are not in conflict.

In Herzfeld, the plaintiff sought $510,000 in damages against Laventhol and other defendants for federal securities law violations and common law fraud. Plaintiff settled the action with, and released, all of the defendants other than Laventhol, for $357,000. The district court approved the settlement with the proviso that Laventhol could bring a third-party action against the settling defendants. 540 F.2d at 37. Laventhol did so, seeking contribution and indemnification from the settling defendants.

Certain defendants, the "Allen" defendants, against whom Laventhol was awarded contribution, appealed from the final judgment.

The Court of Appeals, after reviewing the evidence and noting factual differences between the liability of Laventhol and that of Allen to the plaintiff, concluded that the liability of Allen to the plaintiff had been extinguished by the $357,000 settlement, 540 F.2d at 38, and that even if the liability of Laventhol and Allen to the plaintiff was equal, on the pari delicto theory utilized by the district court, each would be liable for $255,000, or one-half of the total $510,000 claim of plaintiff. Allen, the Court of Appeals concluded, had by the settlement paid plaintiff $357,000, which was more than its share, and "far more than half of Herzfeld's [plaintiff's]

loss." 540 F.2d at 39. Allen, by paying more than its share to plaintiff, "had removed itself from the category of a tort-feasor defendant," 540 F.2d at 38, and Laventhol was not entitled to contribution from Allen.

The Ninth Circuit, addressing in the instant case petitioners' contention that a policy favoring settlement must override any policy favoring contribution, noted that "Congress has expressed its preference between the sometimes conflicting values of settlement and contribution. A right of contribution is enunciated clearly there; the statute is silent as to the encouragement of settlements." 637 F.2d at 675. The court, citing Herzfeld, observed that "[i]f it could be said that appellees' settlement with the plaintiff class had resulted in their bearing their proper share of damages, the

case might be different." 637 F.2d at 675. The court continued:

> "Clearly, however, the settlement did not accomplish this. In paying $8,000 on account of costs, and agreeing to cooperate with plaintiffs in their case against the remaining defendants, appellees [Frank and Folb] have not borne their fair share of what is due to the plaintiff class, if the allegations of the complaint are to be believed. It is not enough for appellees [Frank and Folb] to earn their freedom from liability by assisting the plaintiff class in recovering from these appellants [U.S. Trust and Laventhol] for their alleged error in placing faith too blindly in Frank and Folb." 637 F.2d at 675.

Because none of the criteria set forth in this Court's Rule 19 is met, petitioners devote most of their argument to the contention that "the appropriate analysis is to determine the policy of the appropriate state concerning contribution,

and then to determine whether a contribution action against the settling defendant is consistent with that policy . . . ." (petition, page 11).

The right to contribution in cases involving the federal securities laws, however, is governed by federal, not state, law.[3]

Further, petitioners' cited language from Stratton Group Ltd. v. Sprayregen, 466 F. Supp. 1180 (S.D.N.Y. 1979), concerning a "balance" between

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[3] Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc., 558 F.2d 1113 (2d Cir. 1977); Stella v. Kaiser, 221 F.2d 115 (2d Cir. 1955); Wassel v. Eglowsky, 399 F. Supp. 1330, 1367 (D. Md. 1975), aff'd 542 F.2d 1235 (4th Cir. 1976); Gould v. American-Hawaiian Steamship Company, 387 F. Supp. 163, 167 n.7 (D. Del. 1974); Altman v. Liberty Equities Corporation, 54 F.R.D. 620, 625 (S.D.N.Y. 1972); Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955, 958 n.2 (S.D.N.Y. 1970), aff'd. on opinion below, 442 F.2d 1346 (2d Cir.), cert. denied, 404 U.S. 941 (1971).

federal and state policies (petition, pages 12-13), is from a footnote which constitutes pure dictum, the footnote being to a sentence in the text in which the district judge concludes that he "need not reach this interesting, albeit thorny, question for determination of the instant motion." 466 F. Supp. at 1189.

Gomes v. Brodhurst, 394 F.2d 465 (3rd Cir. 1967); Sabre Shipping Corporation v. American President Lines, 298 F. Supp. 1339 (S.D.N.Y. 1969); and Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962), cited by petitioners, are all non-securities cases, which do not involve, as does the instant case, a statutory right to contribution.

Finally, Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977), and City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), cited

by petitioners, concern the fairness of a settlement as to the plaintiff class, in the face of objections made by members of that class. They have nothing to do with the effect of settlement on the right of a non-settling defendant to contribution under the federal securities laws.

II. With respect to contribution by controlling persons, petitioners meet none of the criteria set forth in Rule 19.

The Court of Appeals rejected petitioners' contention that one held liable under the securities laws as a "controlling person" cannot be liable for contribution. The Ninth Circuit stated that:

> "Had Frank and Folb not settled with the plaintiffs, the separate suit brought against them would have proceeded, and they would have been exposed to liability under §77k to make the same payment for the same

> injury for which appellants may be held liable." 637 F.2d at 675.

As a result, the court concluded, Frank and Folb would be subject to liability for contribution under 15 U.S.C. section 77k(f) of the Securities Act of 1933. 637 F.2d at 675.

Petitioners argue that, in reaching this conclusion, "the court of appeals overlooked federal case law precisely on point." (petition, page 21). The only federal case law cited by petitioners, however, is a 1965 district court case, Shea v. Ungar, CCH Fed. Sec. L. Rep. ¶91,558 (S.D.N.Y. 1965), unreported officially, which did not, in any event, involve a claim under section 77k at all.

The decision of the Court of Appeals is not in conflict with decisions either of this Court or of other courts of appeal. It is, as noted by the Ninth

Circuit, 637 F.2d at 675, fully supported by the language of the securities acts themselves.

III. The Ninth Circuit has not, with respect to the right to indemnification under state law, decided any question of state law which should be decided by this Court.

There is no dispute that in certain limited situations respondents may be entitled to indemnity under whichever state's law is ultimately applied to the common law counts of plaintiff's complaint. The Court of Appeals simply held that "there are unresolved factual issues which must be decided before an entitlement to indemnity can be established under the law of either [New York or Arizona]." 637 F.2d at 676.

As the appeal to the Ninth Circuit followed the district court's granting of summary judgment, there has been no determination of those factual issues, no determination of whether indemnity is or is not available, and, as a result, no decision on a matter of state law which is ripe for adjudication by this Court.

IV. The issues raised do not demand this Court's consideration.

The issues raised by petitioners are not issues that "should be . . . settled by the Supreme Court" (petition, page 26) as petitioners assert. This action has not yet been tried, and the Court of Appeals has simply determined that the district court was in error in granting summary judgment.

Of the three issues raised by petitioners, one is a question of federal securities law concerning which there have, to date, been only two circuit level decisions, neither in conflict with the other; one is a question of federal securities law concerning which there have been no prior circuit level decisions; and one is a question of state law concerning which no conclusion has yet been reached in this case.

Petitioners' assertion of the urgency of the issues is belied by the dearth of circuit decisions. It is submitted that the considerations set forth in Rule 19 are not met and that the issues raised by petitioners should not be considered by this Court.

CONCLUSION

It is urged that the petition for writ of certiorari should be denied.

Respectfully submitted,

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